IN THE

Supreme Court of the United States

No. 73-1583

BRUCE BARKSDALE,

Respondent,

versus

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary,

Relator.

PETITION OF STATE OF LOUISIANA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA B. RUTLEDGE
Assistant Attorney General
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104 Supreme Court Building
301 Loyola Avenue
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SUPREME COURT OF THE UNITED STATES

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REPORT OF PROCEEDINGS BELOW

Barksdale v. Henderson, No. 74-1050 on the docket of the United States Court of Appeals for the Fifth Circuit, Order dismissing appeal, issued February 27, 1974 (see appendix).

Barksdale v. Henderson, No. 71-2411, on the docket of the United States District Court, Eastern District of Louisiana, Order granting Out-Of-Time appeal (see appendix).

JURISDICTIONAL GROUNDS

The Fifth Circuit Court of Appeals handed down its decision in this Habeas Corpus case, dismissing the State of Louisiana's appeal, on February 27, 1974.

The Fifth Circuit Court of Appeals refused a rehearing in this case on March 22, 1974.

The statutory provisions relied on to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 and 28 U.S.C. 2101.

QUESTION FOR REVIEW

Whether a United States Court of Appeals may, without compelling reasons, dismiss an out-of-time appeal granted in the discretion of the United States District Court Judge for excusable neglect?

STATEMENT OF THE CASE

The District Attorney for the Parish of Orleans applied to the United States District Court for the Eastern District of Louisiana for an out-of-time appeal in a habeas corpus proceeding 125 days after the date of the district court's entry of judgment granting the Writ Of Habeas Corpus to the State prisoner, Bruce Barksdale, respondent herein.

After an explanation of the importance of the case and the reasons for the delay, the United States District

Court Judge, the Honorable Herbert W. Christenberry, granted an out-of-time appeal to the State of Louisiana. However, the United States Court of Appeals for the Fifth Circuit, on motion to dismiss by the counsel for Barksdale, dismissed Louisiana's appeal without reasons.

ARGUMENT

The State of Louisiana, through the undersigned Assistant Attorney General of Louisiana and Assistant District Attorney for the Parish of Orleans, strongly opposes the dismissal of the State of Louisiana's appeal in the above captioned matter for the following reasons:

Barksdale urged in the Fifth Circuit that a United States District Court is without authority under any circumstance to grant an appeal beyond a 60 day period. This novel argument is perhaps the result of counsel for Barksdale's confusion between *an extension of time* in which to appeal, a statutory procedure, and *an out-of-time appeal,* an equitable remedy.

While it is true that extensions of time within which to file a notice of appeal must be made within a 60 day period (if not sooner), the out-of-time appeal, as the name itself suggests, has no time limit, except what justice would require. As the Fifth Circuit Court of Appeals noted in *Gann v. Smith:*

> ... the district court should have the authority to permit the notice to be filed out of time in

> extraordinary cases where injustice would otherwise result.' (Quoting an Advisory Committee note) Gann v. Smith, 443 F.2d 352, 353 (5th Cir. 1971).

This Honorable Court has also held that certain circumstances would justify the granting of an out-of-time appeal. In *Fallen v. United States* the following pertinent language appears:

> Overlooked, in our view, was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. *Fallen v. United States*, 378 U. S. 139, 142.

The State of Louisiana submits that extraordinary circumstances in the instant case justify the granting of the out-of-time appeal by the United States District Court judge who granted the Writ of Habeas Corpus to the State prisoner.

This is perhaps the most important appeal the State of Louisiana has ever had in the Fifth Circuit Court of Appeals, because the outcome of this case will effect not only the future fate of Bruce Barksdale, but, more importantly, could invalidate every conviction involving a black individual which was initiated by grand jury indictment or tried by petit jury in Orleans Parish during more than a decade.* If the judgment of the

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*See *State v. Barksdale*, 247 La. 198, 170 So.2d 374 (1965); cert. denied, *Barksdale v. Louisiana*, 382 U.S. 921 (1965).

United States District Court herein is allowed to stand it will void every grand jury indictment and every jury trial of a black person from 1958 until the present day.

In the instant proceeding, the United States District Court Judge, the Honorable Herbert Christenberry, completely ignored the provision of 28 U.S.C. 2254 (d), and proceeded to hold an evidentiary hearing on the method of jury selection in Orleans Parish in 1963 and the preceding years, without first studying the Louisiana court records dealing squarely with this question and pointing out exactly how the factual determination made by the Louisiana courts regarding jury selection in Orleans Parish between 1958 and 1963 was not fairly supported by the Louisiana court records.

Louisiana's failure to immediately appeal Judge Christenberry's far-ranging decision was due to the simple fact that the two Orleans Parish Assistant District Attorneys who had handled the instant case in the Louisiana Courts — Shirley Wimberly and Louise Korns — did not learn of Judge Christenberry's actions until after the statutory time for taking an appeal had elapsed. When this circumstance was made known to Mr. Harry Lee, the magistrate herein, and to Judge Christenberry, and the gravity of the questions herein involved was explained, Judge Christenberry, in his discretion, saw fit to grant to the State of Louisiana an out-of-time appeal in the case, 125 days after the entry of judgment, and at a time when the instant proceeding was *still in the same posture in the Louisiana courts.* Thus, Judge Christenberry's granting of the

out-of-time appeal herein in no way prejudiced Bruce Barksdale.

Speaking of the district court's discretion in determining excusable neglect, the Fifth Circuit in *Gann v. Smith, supra,* said:

> ... we view this portion of the rule to vest in district courts a broad discretion as to what neglect in the filing of a notice of appeal ought to be excused for an additional period of time, and would be reluctant to interfere with the trial judge's determination of excusability. At 353.

The State of Louisiana, through the District Attorney for the Parish of Orleans and the Attorney General of Louisiana, is of the respectful belief that Mr. John Wilson Reed, attorney for Bruce Barksdale, well knew that the Orleans Parish District Attorney personnel, mentioned above, Shirley Wimberly and Louise Korns, were completely unaware of Judge Christenberry's decision granting habeas corpus to Bruce Barksdale, and also knew what far-reaching and catastrophic results the United States District Court judgment herein, if allowed to go unchallenged, would have on the administration of criminal justice in Orleans Parish since 1958, and that therefore Mr. Reed cannot, in good conscience, complain that the United States District Court abused its discretion in granting Louisiana this out-of-time appeal, particularly in view of the fact that Bruce Barksdale has in no way been prejudiced by this out-of-time appeal, not having changed his position in this

proceeding one way or the other since the entry of the judgment of the United States District Court granting him a Writ of Habeas Corpus. The State of Louisiana calls this Honorable Court's attention to the fact that *countless* out-of-time appeals to the Louisiana Supreme Court have been allowed by the Fifth Circuit to persons convicted of crime in the Louisiana Criminal District Courts, the Fifth Circuit's view being that this is an equitable remedy. Is an out-of-time appeal available only to felons, and not the the State of Louisiana in an extremely important case such as the instant one? Relator respectfully suggests that the Fifth Circuit Court of Appeals' action in the instant proceeding in summarily dismissing Louisiana's out-of-time appeal is just another example of how neglectful courts are these days of the rights of society at large, that vast body of law-abiding citizens who are the victims of crime. Are they not also entitled to an out-of-time appeal in extraordinary cases?

CONCLUSION

The State of Louisiana respectfully asks that the judgment of the United States Court of Appeals for the Fifth Circuit dismissing Louisiana's out-of-time appeal be reversed and that the Fifth Circuit be ordered to determine on the merits the State of Louisiana's appeal on the jury question.

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA B. RUTLEDGE
Assistant Attorney General
State of Louisiana

HARRY CONNICK
District Attorney
Parish of Orleans

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301 Loyola Avenue
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CERTIFICATE

I certify that a copy of this Petition for Writ of Certiorari has been mailed to:

John Wilson Reed, Esq.
2735 Tulane Avenue
New Orleans, La. 70119

Attorney for Bruce Barksdale

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1050

BRUCE BARKSDALE,
Petitioner-Appellee,

versus

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before COLEMAN, DYER and RONEY,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

[Filed: Mar. 22, 1974]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1050

BRUCE BARKSDALE,
Petitioner-Appellee,
versus

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before COLEMAN, DYER and RONEY,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss appeal, filed in the above styled and numbered cause, is hereby granted.

IT IS FURTHER ORDERED that the motion of John W. Reed, Esquire, to be appointed as counsel for ap-

pellant under the Criminal Justice Act, retroactive to November 29, 1973, is hereby granted.

/s/ DWD
/s/ J.P.C.
/s/ PHR

[Filed: Feb. 27, 1974]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

No. 73-3393

BRUCE BARKSDALE
Petitioner-Appellee

versus

C. MURRAY HENDERSON, Warden
Respondent-Appellant

Appeal from the United States District Court For the Eastern District of Louisiana

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MOTION FOR OUT OF TIME APPEAL

MAY IT PLEASE THE COURT,

NOW INTO COURT through the undersigned counsel comes the State of Louisiana requesting, that the Court

in this matter grant an out of time appeal, based upon the affidavits of Mr. Shirley Wimberly, Executive Assistant District Attorney for the Parish of Orleans in which he affirms that in the above entitled matter his office did not receive notice of judgment and order of this Honorable Court.

/s/ LEROY A. HARTLEY
LeROY A. HARTLEY
Special Counsel to the
Attorney General
104 Supreme Court Building
301 Loyola Avenue
New Orleans, La. 70112

ON BEHALF OF THE
District Attorney for the
Parish of Orleans

Date of Entry: Nov. 30, 1973

ORDER

Considering the foregoing,

IT IS ORDERED that an Out of Time Appeal be granted in this matter.

/s/ HERBERT W. CHRISTENBERRY
JUDGE

STATE OF LOUISIANA
PARISH OF ORLEANS

AFFIDAVIT

BEFORE ME, the undersigned authority in and for the Parish of Orleans, personally came and appeared:

SHIRLEY G. WIMBERLY, JR.

who, after first by me being duly sworn according to law, did depose and say:

That he is an Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana;

That one of his duties is the coordination among the District Attorney's office and the Criminal Division of the Attorney General's office, State of Louisiana, of all habeas corpus matters, including appeals from the United States District Court for the Eastern District of Louisiana;

That on July 26th, 1973, the decision and order of Section "A" of the United States District Court for the Eastern District of Louisiana in the matter of *United States, ex rel. Bruce Barksdale vs. C. Murray Henderson, Warden, Louisiana State Penitentiary*, Civil Action no. 71-2411, was handed down;

That although the aforesaid office of the Criminal Division of the Attorney General's office received and forwarded copies of the decision and order to affiant's office by mail, affiant in fact never received same and

remained unaware of said decision and order until he made inquiry on November 21, 1973.

SHIRLEY G. WIMBERLY, JR.
Assistant District Attorney

SWORN TO AND SUBSCRIBED BEFORE ME,
THIS ____ DAY OF NOVEMBER, 1973.

NOTARY PUBLIC